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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SEBASTIANO NANI, *Plaintiff*,

— against —

HERBERT BROWNELL, JR., Attorney General of the United States, *Defendant*.

Civil Action No. 4515—56

COMPLAINT

The plaintiff, SEBASTIANO NANI, respectfully alleges:

FIRST: That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review under the Administrative Procedure Act. (5 U.S.C. 1001 et seq.).

SECOND: That the defendant, HERBERT BROWNELL, JR., was duly appointed and confirmed as Attorney General of the United States and continues in that capacity.

THIRD: That the defendant, HERBERT BROWNELL, JR., by virtue of his office as Attorney General of the United States has under his control and supervision and subject to his direction all of the agencies and personnel of the United States Department of Justice, including the Immigration and Naturalization Service.

FOURTH: That the plaintiff was born in Italy in 1906 and has been a resident of the United States continuously since 1924.

FIFTH: That the plaintiff is married to a native-born citizen of the United States, and three children have been born in the United States of such marriage.

SIXTH: That on or about August 30th, 1954, the Immigration and Naturalization Service caused to be issued a warrant for the arrest of the plaintiff in deportation proceedings, and that such warrant was served on plaintiff on the date of its issuance.

SEVENTH. That said warrant charged that the plaintiff was subject to deportation for the following reason: "Section 241(a) of the Immigration and Nationality Act, in that, he has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein; Conspiracy (18 USC 371) to violate Jones-Miller Act (21 USC 174) and Harrison Narcotic Act (26 USC 2553)(a))".

EIGHTH: That on November 10th, 1954 a deportation hearing was instituted against the plaintiff by a Special Inquiry Officer of the Immigration and Naturalization Service.

NINTH: That said Special Inquiry Officer at the termination of such hearing ordered that the plaintiff be deported on the charge contained in the warrant of arrest.

TENTH: That an appeal from such order was taken by the plaintiff to the Board of Immigration Appeals.

ELEVENTH: That the Board of Immigration Appeals found that the charge contained in the warrant of arrest had not been sustained, and, accordingly, in a decision made on April 14, 1955 reversed the findings

and conclusions of the Special Inquiry Officer and ordered that the deportation proceedings against the plaintiff be terminated.

TWELFTH: That the Board of Immigration Appeals referred its decision to the Attorney General for review.

THIRTEENTH: That the Attorney General by decision dated September 23, 1955 reversed the decision and order of the Board of Immigration Appeals.

FOURTEENTH: That the warrant of arrest did not adequately or sufficiently advise the plaintiff of the charge against him, and therefore he was deprived of the opportunity to defend himself against it.

FIFTEENTH: That Section 241(a)(11) of the Immigration and Nationality Act at the institution of these deportation proceedings and during their pendency defined three separate and distinct classes of deportable aliens: first, aliens who are or at any time after entry have been narcotic drug addicts; second, aliens who at any time have been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs; and third, aliens who have been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction forming or addiction sustaining opiate.

SIXTEENTH: That the warrant of arrest charged that the plaintiff was within the third category of deportable aliens set forth in 241(a)(11) of the Immigration and Nationality Act.

SEVENTEENTH: That the Attorney General found that the plaintiff was deportable as being within the second category set forth in section 241(a)(11) of the Immigration and Nationality Act.

EIGHTEENTH: That the Attorney General therefore found plaintiff deportable on a ground different from that charged in the warant of arrest, and that the plaintiff was therefore deprived of his constitutional and statutory right to due process of law.

NINETEENTH: That when the deportation proceedings against plaintiff were instituted and during their pendency, conviction of the crime of conspiracy (18 U.S.C. 371) was not included in Section 241(a)(11) as a ground for deportation.

TWENTIETH: That the Board of Immigration Appeals was therefore correct in its decision that the plaintiff was not deportable by reason of his conviction of the crime of conspiracy, and that the Attorney General was in error when he reversed the decision and order of the Board of Immigration Appeals.

TWENTY-FIRST: That the Board of Immigration Appeals contrary to pertinent regulations did not transmit to plaintiff or his counsel a copy of its decision of April 14th, 1955 until after such decision had been reversed by the Attorney General.

TWENTY-SECOND: That the Board of Immigration Appeals contrary to pertinent regulations did not furnish notice to plaintiff or his counsel that it had referred its decision of April 14th, 1955 to the Attorney General for review.

TWENTY-THIRD: That the failure by the Board of Immigration Appeals to make timely service upon the plaintiff or his counsel of a copy of its decision and to furnish plaintiff or his counsel with notice that such de-

cision had been referred to the Attorney General for review deprived the plaintiff of the opportunity to submit briefs, memoranda, or other material to the Attorney General to be considered in connection with his review of the decision of the Board of Immigration Appeals.

TWENTY-FOURTH: That the warrant of arrest and the deportation proceedings violated the constitutional and statutory rights of the plaintiff to due process of law.

WHEREFORE, plaintiff prays for judgment:

1. Declaring that the warrant of arrest and all proceedings pursuant thereto are invalid, null, void, and of no effect.

2. Restraining the defendant and all persons under his supervision and control from taking plaintiff into custody and deporting him.

3. That pending the final determination of this cause a preliminary injunction be issued restraining and enjoining the defendant and all persons under his supervision and control from taking plaintiff into custody and deporting him.

4. That pending the issuance of such preliminary injunction a temporary order be issued forthwith, restraining and enjoining the defendant and all persons under his supervision and control from taking plaintiff into custody and deporting him.

5. Granting such other and further relief as may be just and appropriate.

/s/ WILLIAM H. COLLINS
/s/ SAMUEL PAIGE
Attorneys for Plaintiff

• • • • •

ORDER

This cause having come on for hearing on defendant's motion for summary judgment, and the Court having considered the pleadings and exhibits filed herein, and a full and complete hearing having been accorded the parties thereto, and the Court having found that there is no genuine issue of material fact and the defendants as a matter of law are entitled to judgment herein, it is this 3rd day of April, 1957

ORDERED that the defendant's motion for summary judgment be and the same hereby is granted and the complaint herein is dismissed, and it is

FURTHER ORDERED that the preliminary injunction issued herein be and the same hereby is terminated.

/s/ MATTHEW F. McGUIRE
MATTHEW F. McGUIRE, Judge

Submitted by:

/s/ E. RILEY CASEY
E. RILEY CASEY
Assistant United States Attorney
Attorney for Defendant

Seen: No objection as to Form:

/s/. WILLIAM H. COLLINS
WILLIAM H. COLLINS
Attorney for Plaintiff

MEMORANDUM

The plaintiff filed a complaint seeking a declaratory judgment declaring that a warrant of arrest directed towards his deportation and all proceedings pursuant thereto to be declared invalid and void. A temporary restraining order and a preliminary injunction enjoining the defendant from acting upon the same until further order of the Court was subsequently entered.

The ground of deportation is predicated upon the fact that on August 27, 1954 the plaintiff was sentenced to three years imprisonment upon his conviction in the United States District Court for the Northern District of California for violation of 18 U.S.C. 371, the so-called Conspiracy Statute, the laws which he was held to be in conspiracy to violate being those relating to narcotic drugs, all within, the Government claims, the purview of Title 8, 1251 U.S.C.A.

The reasons adduced and which he relies upon in his effort to invalidate the warrant of deportation are two: (1) that the crime of conspiracy is *not* a ground for deportation under the statute and, (2) that he was not notified of referenee of his case to the Attorney General after the action of the Board of Immigration Appeals had made such and that this violated due process. These contentions will be disposed of seriatim, and both are without merit.

First, there is no question but that conspiracy is a separate offense. It was a misdemeanor at common law and by statute it has been integrated into the body of federal criminal law. There are numerous cases, so numerous as to remove the question completely even from the area of argument, holding that the crime of conspiracy, so-called, is separate and distinct from the substantive offense. However, conspiracy cannot exist in a vacuum. It is an unlawful design or agreement to do something. It takes

its character and its quality from the nature of the law towards whose violation it is or was directed, and in this particular instance it was to violate the narcotics laws of the United States. There is no doubt, therefore, as a consequence, that a person convicted of a conspiracy directed towards the violation of the statutes in relation to narcotic drugs is guilty of a violation of law *relating to* the illicit traffic in the same. Any other conclusion would do violence to common sense and the plain intent of the statute itself.

Another question is whether or not the warrant of deportation complies with the nature of the crime of which the plaintiff was convicted. It does. It specifically states in the last sentence that he was convicted of "conspiracy (18 U.S.C. 371) to violate the Jones-Miller Act (21 U.S.C. 174) and the Harrison Narcotics Act (26 U.S.C. 2553 (a))." The fact that it is recited in the body of the warrant above this sentence that he has been "convicted of a violation of any law or regulation governing the taxing . . ." of such drugs is mere surplusage and addenda. It actually adds nothing and it takes nothing away. The fact is that he was *not* so convicted, *but he was convicted of conspiracy relating to such.*

The second argument in relation to so-called denial of due process is without substance. *Bannout* v. *Brownell*, 129 Fed.Supp.488 can be distinguished. In that case there *was* a violation of a regulation in that the decision of the Board of Immigration Appeals was not transmitted to plaintiff's counsel. This is wanting here. With reference, however, to that part of the opinion of the Court holding that upon reference to the Attorney General of the case for review by the Board the regulation *requires* that the plaintiff or his attorney be notified and "that it necessarily implies that notice of this reference must be given to the alien or his counsel in order that an opportunity may be accorded for the submission of briefs or

memoranda or other material to the Attorney General in connection with his review of the decision of the Board" this Court does not concur. The pertinent regulation is set forth in Title 8 C.F.R. 6(f), p. 18. It reads as follows: "The decision of the Board shall be in writing . . ." and (h) "The Board shall refer to the Attorney General for *review* all cases . . ." and nowhere is it provided specifically for notification of this fact to the individual concerned nor is it implied. *Morgan* v. *United States*, 298 U.S. 468, upon which the Court relied, also can be distinguished.[1] There the Court was concerned with the statute specifically providing for a "full hearing," and the Court held that the words of the statute meant just that. Cf. also *Ex Parte Bridges*, 49 Fed. Supp. 292 at 304, affirmed 144 F.2d 927, and reversed on *other grounds*; Bridges v. Wixon 326 U.S. 135.

Order accordingly.

/s/ MATTHEW F. McGUIRE
MATTHEW F. McGUIRE
United States District Judge.

March 27, 1957

[1] See also, generally, Morgan v. U.S., 304 U.S. 1.

WARRANT

For Arrest of Alien

UNITED STATES OF AMERICA
Department of Justice
Immigration and Naturalization Service
San Francisco, California

No. A-1732847

To Immigration Officer John H. McGowan

Or to any officer in the service of the United States Immigration and Naturalization Service

WHEREAS, from evidence submitted to me, it appears that the alien SEBASTIANO NANI who entered this country at New York, New York on the 20th day of October 1924 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the folowing provisions of law, and for the following reasons to wit:

Section 241(a) of the Immigration and Nationality Act, in that, he has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein; Conspiracy (18 USC 371) to violate Jones-Miller Act (21 USC 174), and Harrison Narcotic Act (26 USC 2553 (a)).

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you

to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1955.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 30th day of August, 1954.

/s/ BRUCE G. BARBER
BRUCE G. BARBER
District Director
San Francisco District

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service
Seattle

December 15, 1954

File: A1-732-847

In Re: SEBASTIANO NANI

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

Edwards E. Merges, Attorney
1511 Smith Tower, Seattle, Wash.

CHARGES:

Warrant: Immigration & Nationality Act - Convicted of violation of law governing taxing, etc., of narcotic drugs: Conspiracy to violate 21 USC 174 and 26 USC USC 2553(a).

Lodged: None

APPLICATION: None

DETENTION STATUS: Incarcerated U.S. Penitentiary, McNeil Island, Wash.

WARRANT OF ARREST SERVED: August 30, 1954.

DISCUSSION: This record relates to a 48 year old married male, a native and citizen of Italy, who entered the United States as a stowaway at New York, N.Y., on October 2, 1924. This unlawful entry was corrected by the relief of suspension of deportation on May 11, 1944 pursuant to Section 19(c)(2) of the Immigration Act of 1917, to show a lawful entry for permanent residence as of October 2, 1924. On August 27, 1954 the respondent was convicted by a verdict of guilty in the United States District Court at San Francisco for conspiracy, in violation of 18 USC 371, in that he conspired to sell heroin in violation of Sections 2553 and 2557 of 26 USC and to conceal and facilitate the concealment and transportation of heroin, in violation of Section 174 21 USC. The crime of conspiracy[1] is complete upon the commission of an overt act[1]. The overt act pursuant to the conspiracy for which the respondent was convicted is found in Count 24 of the indictment. The substantive offenses in violation of Section 2553 and 2557, and Section 174 of 21 USC, are both violations of laws governing the sales and importation, respectively, of heroin. Accordingly, it is concluded that the respondent is deportable on the charge as stated in the warrant of arrest.

The respondent is married to a United States citizen. There are three children of this marriage. His wife and family are all residing in New York. His wife is presently dependent upon his two eldest children for support. He has no assets. Apart from his present conviction for narcotics, he was also convicted on May 7, 1954 in the United States District Court at Brooklyn, New York for

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[1] *Hall* v. *U.S.*, 109 F. 2d 976 (CCA).

bribery. He has not specified any country to which he desires to be deported in the event deportation is ordered.

FINDINGS OF FACT: Upon the basis of all the evidence adduced it is found:

(1) That the respondent is an alien, a native and citizen of Italy;

(2) That the respondent was admitted to the United States at New York, N.Y., October 2, 1924 for lawful permanent residence;

(3) That the respondent was convicted in the United States District Court at San Francisco August 27, 1954 by verdict of guilty of conspiracy, in violation of 18 USC 371, in that he conspired to violate 26 USC 2553 and 2557, and 21 USC 174.

CONCLUSION OF LAW: Upon the basis of the foregoing findings of fact, it is concluded:

That under Section 241(a)(11) of the Immigration and Nationality Act the respondent is subject to deportation in that he has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein; Conspiracy (18 USC 371) to violate Jones-Miller Act (21 USC 174) and Harrison Narcotic Act (26 USC 2553(a)).

ORDER: It is ordered that the alien be deported from the United States in the manner provided by law on the charge contained in the warant of arrest.

DAVID S. CALDWELL.
Special Inquiry Officer

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

File: A-1732847—Seattle

In re: SEBASTIANO NANI

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

Marion Schwartz, Attorney
Mills Building
Washington 6, D. C.
(Heard: January 26, 1955)
(Brief filed)

CHARGES:

Warrant:—Immigration and Nationality Act—Convicted of violation of law governing taxing, etc., of narcotic drugs: Conspiracy (18 USC 371) to violate Jones-Miller Act (21 USC 174) and Harrison Narcotic Act (26 USC 2553(a)).

Lodged:—None

APPLICATION: None

DETENTION STATUS: Incarcerated U.S. Penitentiary, McNeil Island, Wash.

The case comes forward on appeal from the order of the special inquiry officer dated December 15, 1954 ordering the alien deported on the charge stated in the warrant of arrest.

The record relates to a native and citizen of Italy, 48 years old, male, who last entered the United States at the port of New York, New York on October 2, 1924 as a stowaway. He was previously granted suspension of deportation and his status was adjusted under Section 19

(c)(2) of the Immigration Act of 1917 on May 11, 1944 to show a lawful entry for permanent residence on October 2, 1924.

On August 27, 1954 in the United States District Court at San Francisco, Southern District of California, Southern Division, the respondent was convicted of the crime of conspiracy in violation of 18 USC 371. The record of conviction shows that the respondent was charged in the twenty-fourth count with conspiracy (18 USC 371) with a number of other persons in that he conspired with certain named persons to sell, dispense and distribute heroin in violations of Sections 2553 and 2557 of Title 26 United States Code, and to conceal and facilitate the concealment and transportation of quantities of heroin imported into the United States contrary to law as the said defendant well knew in violation of Section 174 of Title 21 United States Codes. The acts in furtherance of the conspiracy, relating to the respondent are charged in Paragraphs 33 and 34 of the overt acts in the indictment, and occurred on or about February 10, 1951.

Deportation of the alien is sought under Section 241(a)(11) of the Immigration and Nationality Act. This section provides for the deportation of any alien who:

> (11) is or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of

opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate.

Previously, deportability based upon the illegal traffic in narcotics was contained in the Act of February 18, 1931, as amended, (8 USC 156(a)) which provided:

> That any alien * * * who, after the enactment of this Act, shall be convicted for violation or *conspiracy to violate* any statute of the United States * * * taxing, prohibiting or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of * * * heroin * * * shall be taken into custody and deported in manner provided in Sections 19 and 20 of the Act of February 5, 1917 * * *. (Underscoring supplied).

A comparison of the 1931 and the 1952 Acts concerning deportation on the ground of illicit traffic in narcotics reveals that the former specifically includes not only a conviction for a violation of a narcotic trafficking statute but also a conviction for conspiracy to violate such a statute, while the latter act is silent on this point of conspiracy and refers only to a conviction of a violation of any law or regulation *relating* to the illicit traffic in narcotic drugs. We conclude that this omission is fatal insofar as the present conviction is concerned, since in the instant case the alien has been convicted only of conspiracy in violation of 18 USCA 371. While it is true that the substantive acts which are charged in the record of conviction as the objects of the conspiracy relate to the illicit traffic in narcotics it is well settled that a conspiracy to commit a crime is a different offense, notwithstanding that the substantive offense is charged as one of the overt acts committed in furtherance of the conspiracy.[1] The crime of conspiracy to commit an offense

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[1] *Braverman* v. *United States*, 317 US 49 (1942); *United States* v. *Bayer*, 331 U.S. 532 (1947).

is distinct from the offense itself[2] It has been repeatedly declared in decisions of the Supreme Court that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.[3] The conspiracy is the crime, however diverse its object. A conspiracy is not the commission of the crime which it contemplates, and neither violates nor "arises under" the statute whose violation is its object.[4]

It is therefore concluded that the crime of conspiracy in violation of Section 371, Title 18 USCA is a separate and distinct offense from the substantive offense charged in the record of conviction and that the crime of conspiracy does not constitute a conviction of a violation of a law relating to the illicit traffic in narcotic drugs. The proceedings will be terminated.

ORDER: It is ordered that the proceedings be and the same are hereby terminated.

Chairman

COMMISSIONER'S MOTION

DISCUSSION: The above-named alien was found deportable by the Special Inquiry Officer, after hearing, by reason of the alien's conviction on August 27, 1954, for conspiracy (18 U. S. C. 371) to violate certain laws relating to the illicit traffic in narcotic drugs.

The Board of Immigration Appeals has now entered an order reversing the Special Inquiry Officer and terminating the deportation proceedings. The Board reaches the conclusion that the crime of "conspiracy" in violation of

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[2] *United States* v. *McElvain*, 272 US 633 (1926).

[3] *United States* v. *Rabinowich*, 238 US 87 (1915) and cases cited therein.

[4] *United States* v. *Lutwak*, 195 F. 2d 748 (C.A.7, 1952).

section 371, Title 18 U. S. C. is a separate and distinct offense from the substantive offense charged in the record of conviction and does not constitute a violation of law relating to the illicit traffic in narcotic drugs within the meaning of section 241 (a) (11) of the Immigration and Nationality Act. The Board supports its conclusion by pointing to the fact that the predecessor statute, the Act of February 18, 1931, specifically referred to "conspiracy to violate" the narcotic laws while section 241 (a) (11) omits any such reference.

The Service believes that the Board's interpretation of the statute is erroneous. It is evident from a reading of the legislative history of the Immigration and Nationality Act that Congress intended not to limit but to broaden the area of deportability with respect to aliens trafficking in illicit drugs. Congress was aiming not only at the small-time "dope peddlers" but at the bosses who control and direct this nefarious traffic. These men are, more often than not, indictable as conspirators.

The omission of which the Board speaks is not significant. More than likely Congress felt it was unnecessary to include any specific reference to "conspiracy" to violate the narcotic laws in view of the unrestricted sweep of the language contained in section 241 (a) (11). Nowhere in the legislative history of the Immigration and Nationality Act is there any indication that Congress intended to relieve from the consequences of deportation those convicted of conspiring to violate the narcotic laws while enforcing expulsion only against those convicted of substantive narcotic offenses. A plain reading of the language in section 241 (a) (11) negates any such conclusion. The statute is broad enough to encompass convictions for conspiracy whenever such conspiracy has as its object violation of the laws relating to the illicit traffic in narcotic drugs.

REQUEST IS HEREBY MADE that this case be referred to the Attorney General for review pursuant to 8 CFR 6.1 (h)(iii).

OFFICER OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

September 23, 1955

File A-1732847—Seattle

In re Sebastiano Nani

Before the Attorney General in Deportation Proceedings

The above captioned case was referred to the Attorney General by the Board of Immigration Appeals pursuant to 8 C. F. R .Section 6.1 (b) (i).

The record relates to a native and citizen of Italy who last entered the United States on October 2, 1924, as a stowaway. On May 11, 1944, he was granted suspension of deportation and his status adjusted under Section 19 (c) (2) of the Immigration Act of 1917.

On August 27, 1954, in the Southern District of California, Nani was convicted of the crime of conspiracy in violation of 18 USC § 371, in that he conspired with others to sell, dispense and distribute heroin in violation of 26 USC §§ 2553, 2557, and to conceal and facilitate the concealment and transportation of, heroin in violation of 21 USC § 174.

The Special Inquiry Officer found the alien deportable under Section 241 (a) (11) of the Immigration and Nationality Act of 1952. The Board of Immigration Appeals ordered the proceeding terminated on the ground that Section 241 (a) (11), which provides for the deportation of aliens who traffic in narcotics, does not embrace aliens convicted of "conspiracy to violate" narcotic

laws. The Board's opinion points out that the prior law, the Act of February 18, 1931, specifically included the phrase "conspiracy to violate". The Board attaches controlling importance to the absence of the phrase in the 1952 Act.

Section 241 (a) (11) reads as follows:

> "(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiates."

I agree with the Board that the crime of conspiracy as defined by 18 USC § 371, is a separate and distinct offense from the crime which is the object of the conspiracy. Braverman v. United States, 317 U. S. 49 (1942); United States v. Bayer, 331 U. S. 532 (1947); American Tobacco Company v. United States, 328 U. S. 781 (1946); United States v. McElvain, 272 U. S. 633 (1926). I do not agree, however, with the Board's ultimate conclusion with respect to its interpretation of the Immigration and Nationality Act of 1952. The controlling phrase in Section 241 (a) (11) is "relating to". On its face it is broad enough to cover a conviction for conspiracy to violate the narcotic laws. Courts have construed the phrase to have broad coverage. Bowles v. Ohio Fuel Gas Co., 65 F. Supp. 426 (N. D. Ohio 1946), aff'd 158 F. 2d 814 (6th Cir. 1947); Commonwealth v. Mathues, 210 Pa. 372, 407, 59 A 961, 975 (1904).

The Subcommittee of the Senate Committee on the Judiciary, reporting on the Bill, stated (S. R. 1515, 4/20/50):

> "The sub-committee recommends that the immigration laws contain specific provision for the deportation of aliens who have been convicted of any law pertaining to narcotics. Such aliens should be deportable, whether the conviction occurred prior to or after entry into the United States. The deportable class will include those convicted under any law in this country pertaining to narcotics or under any such law of a foreign country."

It seems clear that it was the Subcommittee's intention to broaden the coverage of the immigration laws with respect to aliens convicted of laws "pertaining to narcotics".

For the foregoing reasons the decision and order of the Board are reversed.

WILLIAM P. ROGERS
Acting Attorney General

Sept. 23, 1955

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SEP 6 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 433

SEBASTIANO NANI, *Petitioner*

v.

HERBERT BROWNELL, JR., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM H. COLLINS
Shoreham Building
Washington 5, D.C.

SAMUEL PAIGE
261 Broadway
New York 7, N.Y.
Attorneys for Petitioner

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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Regulations:

Title 8, Code of Federal Regulations:
Section 6.1 ..... 4, 6
Section 6.1(e) 9
Section 6.1(f) 2, 9
Section 6.1(h) 2, 9
Section 6.11 6

Miscellaneous:

House Conference Report No. 2546 (84th Congress, 2d Session) 16
Senate Document No. 145 (84th Congress, 2d Session) 16
Senate Report No. 1997, Calendar No. 2014 (84th Congress, 2d Session) 17
United States Code Congressional and Administrative News, Vol. 2 (1956) 16

IN THE

Supreme Court of the United States

October Term, 1956

No.

SEBASTIANO NANI, *Petitioner*

v.

HERBERT BROWNELL, JR., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Sebastiano Nani, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on June 27, 1957.

OPINIONS BELOW

The opinion of the District Court is unreported. It is set forth in the appendix to petitioner's brief (pp. 7-9), submitted to the United States Court of Appeals, hereinafter referred to as the "Record".

The opinion of the Court of Appeals is unreported. It is set forth in the appendix to this petition, infra pp. 19-22.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the Board of Immigration Appeals violate Section 6.1(f) of Title 8 of the Code of Federal Regulations by its failure to serve a copy of its decision upon petitioner or his counsel?

2. Did the Board violate Section 6.1(h) of Title 8 of the Code of Federal Regulations by its failure to give notice to the petitioner or his counsel of the reference of its decision to the Attorney General for review?

3. Did the failure of the Board, set forth in questions 1 and 2, violate Section 292 of the Immigration and Nationality Act (8 U.S.C. Section 1362, 66 Stat. 235) by depriving the petitioner of representation by counsel in appeal proceedings before the Attorney General?

4. Did the failure of the Board, set forth in questions 1 and 2, resulting in the exclusion of petitioner and his counsel from participating in the decisive phase of the deportation proceedings, deprive him of due process, in view of the fact that the Board transmitted its decision to the Commissioner of Immigration and Naturalization, the adversary party, who thereafter submitted written argument attacking such decision, without the knowledge of the petitioner?

5. May an alien be deported on grounds other than those set forth in the warrant of arrest in deportation proceedings?

6. Was a conviction of conspiracy (18 U.S.C. Section 371, 62 Stat. 701) a basis for deportation under Section 241(a)(11) of the Immigration and Nationality Act?

STATUTES AND REGULATIONS INVOLVED

During the pendency of the deportation proceedings here involved, Section 241(a)(11) of the Immigration and Nationality Act (66 Stat. 204, 206-207, U.S.C.A., Title 8, Section 1251(a)(11)) provided as follows:

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who — • • •
>
> "(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;"

Section 292 of the Immigration and Nationality Act (66 Stat. 235, U.S.C.A., Title 8, Section 1362) provides as follows:

> "In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

The pertinent regulations appear in Title 8 of the Code of Federal Regulations, and are as follows:

"Section 6.1 *Board of Immigration Appeals*—(a) *Organization.* There shall be in the office of the Attorney General a Board of Immigration Appeals. • • •

"(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following: • • •

"(2) Decisions of special inquiry officers in deportation cases, as provided in Section 242.61 of this chapter; • • •

"(e) *Oral argument.* Oral argument shall be heard by the Board upon request, in any case over which the Board acquires jurisdiction by appeal or certification as provided in this part. If an appeal has been taken, request for oral argument if desired shall be included in the Notice of Appeal. • • • The Service may be represented in argument before the Board by any officer designated by the Assistant Commissioner, Inspections and Examinations Division. • • •

"(f) *Service of Board decisions.* The decision of the Board shall be in writing and copies shall be transmitted by the Board to the Service and a copy served upon the alien or party affected as provided in Sections 292.11 and 292.12 of this chapter. • • •

"(h) *Referral of cases to the Attorney General.* (1) The Board shall refer to the Attorney General for review of its decision all cases which:

"(i) The Attorney General directs the Board to refer to him. • • •

"(iii) The Assistant Commissioner, Inspections and Examinations Division requests be referred to the Attorney General for review. • • •

"Section 292.11 *Service upon and action by attorney, representative, or alien.* Except where specific provision is otherwise made in this chapter, whenever

a person is required by any of the provisions of this chapter (a) to give or be given notice; (b) to serve or be served with any paper other than a warrant of arrest or a subpoena; (c) to make a motion; (d) to file or submit an application or other document; or (e) to perform or waive the performance of any act, such notice, service, motion, filing, submission, performance, or waiver shall be given by or to, served by or upon, made by, requested of (1) the attorney or representative who has filed an appearance in the case as provided in Section 292.5, or (2) the person himself, if there is no attorney or representative in the case.

"Section 292.12 *Service of decision and other papers.* Except where specific provision is otherwise made in this chapter, whenever a decision, notice or other paper is required to be given or served, it shall be done by personal service or registered mail upon the person designated in Section 292.11."

STATEMENT

Petitioner, a native of Italy, has been a resident of the United States continuously since 1924, at which time he was 18 years of age. He is married to a native born citizen of the United States and has three children, all of whom were born in this country. (R. 13)

Deportation proceedings against petitioner were instituted on August 30, 1954 by the service upon him of a warrant of arrest. (R. 10-11) The warrant charged that the petitioner was deportable for the following reason:

"Section 241(a) of the Immigration and Nationality Act, in that, he has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing,

giving away, importation or exportation of any of the drugs described therein; Conspiracy (18 USC 371) to violate Jones-Miller Act (21 USC 174) and Harrison Narcotic Act (26 USC 2553 (a))."

A hearing was held before a special inquiry officer, who prepared a Conclusion of Law in the identical language contained in the warrant of arrest (R. 12-13). Based on such Conclusion of Law, he ordered that the petitioner be deported.

The petitioner thereupon filed a notice of appeal to the Board of Immigration Appeals.

The Board is created by regulations which define its jurisdiction and procedures (Title 8, Code of Federal Regulations, Sections 6.1 and 6.11). By virtue of such regulations, the Commissioner and the alien involved in a deportation proceeding are both entitled to present oral argument before the Board.

The Board on April 14, 1955, in a carefully reasoned decision, ordered that the deportation proceedings against petitioner be terminated for the reason that a conviction of conspiracy was not a basis for deportation under Section 241(a)(11) of the Immigration and Nationality Act (8 U.S.C. Section 1251(a)(11), 66 Stat. 204). (R. 14-17)

The Board stated in part as follows:

"While it is true that the substantive acts which are charged in the record of conviction as the objects of the conspiracy relate to the illicit traffic in narcotics it is well settled that a conspiracy to commit a crime is a different offense, notwithstanding that the substantive offense is charged as one of the overt acts committed in furtherance of the conspiracy. The crime of conspiracy to commit an offense is distinct from the offense itself. It has been repeatedly declared in decisions of the Supreme Court that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. The con-

spiracy is the crime, however diverse its object. A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object." (Footnotes omitted.)

The Board, however, did not notify petitioner or his counsel that its decision and order had been rendered and did not serve upon either of them a copy thereof. (R. 4) It did, however, immediately transmit a copy of its decision to the Commissioner of Immigration and Naturalization. On the very day of the Board's decision, the Commissioner, without the knowledge of petitioner or his counsel, submitted a motion wherein he set forth argument that the Board's interpretation of the statute and its decision were erroneous, and he requested that such decision be referred to the Attorney General for review (R. 17-19).

Thereafter, the Board, again without notice to petitioner or his counsel, referred its decision to the Attorney General. On September 23, 1955 the Attorney General reversed the decision and order of the Board. (R. 19-21) Thereafter, a copy of the decision of the Board of Immigration Appeals and of the decision of the Attorney General, reversing the Board, were transmitted to counsel for the petitioner.

Petitioner instituted this action on November 27, 1956, to secure review of the deportation order and injunctive relief therefrom. (R. 1-5) In his complaint, petitioner contended that the deportation proceedings were defective because they violated the requirements of applicable regulations, because he had been deprived of his right to due process, and because his conviction of conspiracy was not a basis for deportation.

A motion by respondent for summary judgment was granted by order of the District Court on April 3, 1957 (R. 6). The Court (McGuire, J.) held, first, that peti-

tioner's conviction of conspiracy rendered him deportable, and second, that he was not entitled under the regulations to notice that the decision of the Board of Immigration Appeals had been referred to the Attorney General for review. The Court implied that the requirements of due process were satisfied if there had been a compliance with such regulations. (R. 7-9).

The Court of Appeals, Circuit Judge Bazelon dissenting, affirmed. The majority opinion agreed with the District Court that petitioner's conviction of conspiracy made him deportable. It held that since the case involved solely a question of law, with respect to which the majority was in agreement with the Attorney General, petitioner could not allege a lack of due process or noncompliance with law and regulation.

The dissenting opinion held that petitioner was entitled under applicable regulations to notice that the decision of the Board of Immigration Appeals, in his favor, had been referred to the Attorney General for review and that the plain purpose of such notice was to give petitioner an opportunity to support his position in a brief to the Attorney General. It further held that petitioner had been deprived of that opportunity since he was not given notice until after the Attorney General had reversed the decision of the Board. Relying on *Accardi* v. *Shaughnessy*, 347 U.S. 260, the dissent stressed the importance of preserving the integrity of each step in the regulatory scheme for administrative decision. The dissenting opinion also contained the following language:

> "As long as the regulations in the instant case remain operative, the appellant must be afforded the opportunity to defend the Board's decision in his favor and the Attorney General must fairly consider any argument made. Since appellant was denied the opportunity to defend the Board's favorable decision

before the Attorney General reversed it, the Attorney General's decision was not made in accordance with law and is therefore fatally defective."

REASONS FOR GRANTING THE WRIT

1. The instant case for the first time poses before this Court the question of the rights of an alien in the concluding phase of deportation proceedings. Petitioner had duly filed his notice of appeal from the adverse decision of the special inquiry officer. Since both the Commissioner and the petitioner were entitled by virtue of Section 6.1(e) of Title 8 of the Code of Federal Regulations to argue the case before the Board of Immigration Appeals, the proceedings were clearly of an adversary character. Counsel for the petitioner argued before the Board on his behalf.

The facts disclose, however, that subsequent to such argument, both petitioner and his counsel were systematically and entirely excluded from further participation in these proceedings. In violation of Section 6.1(f) of Title 8 of the Code of Federal Regulations, the Board did not serve upon petitioner or his counsel a copy of its decision. In violation of Section 6.1(h) of Title 8 of the Code of Federal Regulations, the Board did not notify petitioner or his counsel of the reference of its decision to the Attorney General for review. On the other hand, petitioner's adversary, the Commissioner, was furnished with a copy of the Board's decision and submitted written argument attacking such decision for the consideration of the Attorney General. The petitioner and his counsel were not notified of such argument and therefore had no opportunity to respond to it.

It was not until the decision of the Board had been reversed by the Attorney General that petitioner was notified thereof. A period of over four months had

elapsed from the rendition of the Board's decision to its reversal by the Attorney General. During this crucial period, petitioner and his counsel were kept in complete ignorance of these developments. These proceedings violated the regulations herein cited and they also deprived the petitioner of the privelege of representation by counsel before the Attorney General, guaranteed by Section 292 of the Immigration and Nationality Act. Moreover, they clearly violated the constitutional requirement of due process of law. They also violated the concept of fair play in that an adversary was given an unfair advantage.

This Court has recognized that deportation may result in the loss of all that makes life worth living. *Ng Fung Ho* v. *White*, 259 U.S. 276. Accordingly, it has consistently held that an alien is entitled to due process of law in deportation proceedings. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149; *Accardi* v. *Shaughnessy*, supra; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *Bridges* v. *Wixon*, 326 U.S. 135, 152-153. It has also held that such protection extends to all phases of such proceedings.

It is respectfully submitted that this Court should strike down the decision of the Court below, which has the dangerous effect of sanctioning a departure not only from the requirements of due process and fair play but also from the regulations and statutes designed as safeguards for the alien. There is not the slightest foundation for the position of the Court below that these basic rights need not be upheld where issues of law as distinguished from issues of fact are involved. On the contrary, as Circuit Judge Bazelon indicated in his dissent, the integrity of each step in deportation proceedings must be preserved and, since the Attorney General's decision was not made in accordance with law, it is fatally defective.

In *Bridges*, supra, this Court stated in part as follows:

> "The rules are designed to protect the interests of the alien and to afford him due process of law. . . . The rules afford protection at that crucial stage of the proceedings or not at all. . . . It was assumed in *Bilokumsky* v. *Tod*, 263 U.S. 149-155, that 'one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law'. We adhere to that principle. For these rules are designed as safeguards against essentially unfair procedures." (pp. 152-153)

2. In *Morgan* v. *United States*, 298 U.S. 468, this Court held that the right to submit argument, oral or written, to the person making the ultimate decision in an administrative proceeding was one of the essentials of due process. In the second *Morgan* case, 304 U.S. 1, this Court used the following language, which is especially pertinent:

> "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps. . . . The maintenance of proper standards on the part of administrative agencies and the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. For, as we have said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purpose for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." (pp. 20-22)

The principle of the *Morgan* cases was embodied in Section 8(b) of the Administrative Procedure Act (5 U.S.C. Section 1007(b), 60 Stat. 242), which provides in pertinent part as follows:

"SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. . . ."

In *Wong Yang Sung* v. *McGrath*, supra, this Court stated (pp. 50-51):

"When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It may be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemened by Congress as unfair even where less vital matters of property rights are at stake."

Thus, even in the absence of regulation, petitioner would have the right to submit argument to the Attorney General.

3. The warrant of arrest charged that the petitioner

". . . is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

"Section 241(a) of the Immigration and Nationality Act, in that, he has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation, or the possession for the purpose of manufacture, production, compounding,

transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein; Conspiracy (18 USC 371) to violate Jones-Miller Act (21 USC 174) and Harrison Narcotic Act (26 USC 2553 (a))." . (R. 10-11)

The Attorney General found petitioner deportable as an alien who had been convicted of

"'. . . a violation of any law or regulation relating to to the illicit traffic in narcotic drugs. . . ."

Section 241(a)(11) of the Immigration and Nationality Act at the institution of these proceedings and during their pendency defined three separate and distinct classes of deportable aliens: first, aliens who are or at any time after entry have been narcotic drug addicts; second, aliens who at any time have been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs; and third, aliens who have been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction forming or addiction sustaining opiate.

It is apparent, therefore, that the warrant of arrest charged the petitioner with being within the third category of deportable aliens set forth in Section 241(a)(11) of the Immigration and Nationality Act.

The Attorney General, however, did not find that the petitioner was within said third category of deportable aliens. In effect, the Courts below and the Attorney General found that the petitioner had not been convicted of a violation of any law or regulation as set forth

in the warrant of arrest. They found instead that petitioner was deportable as coming within the second category of deportable aliens, namely, those who had been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs. The warrant of arrest, however, did not charge the petitioner with being within this category.

Thus, the petitioner has been held deportable on a charge different from that alleged in the warrant of arrest. Such finding is in conflict with a basic requirement of due process. *Takeo Tadano* v. *Manney*, 160 F.2d 665.

4. The Courts below and the Attorney General regarded the following language of Section 241(a)(11) of the Immigration and Nationality Act as applicable to the instant case:

> "Any alien . . . shall . . . be deported . . . who . . . has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs . . ."

It is apparent from a reading of th estatute that the word "relating" qualifies the words "any law or regulation". In other words, a relationship must exist between the law or regulation which has been violated and the illicit traffic in narcotic drugs.

The Court below agreed with the District Court that petitioner's conviction of conspiracy was "a violation of any law or regulation relating to the illicit traffic in narcotic drugs".

This Court has consistently held that the crime of conspiracy is wholly separate and distinct from the crime that is the object of the conspiracy. *Braverman* v. *United States*, 317 U.S. 49; *United States* v. *Bayer*, 331 U.S. 532; *United States* v. *McElvain*, 272 U.S. 633; *United States* v. *Rabinowich*, 238 U.S. 78; *American Tobacco Co.* v.

United States, 328 U.S. 781. The decision of the Court below, finding a relationship between the crime of conspiracy and the object of such crime, is in direct conflict with the prior decisions of this Court. It is respectfully submitted that such conflict should be reviewed by this Court.

Legislative history fortifies the conclusion that petitioner's conviction of conspiracy did not make him deportable. In its decision, the Board of Immigration Appeals stated:

> "Previously, deportability based upon the illegal traffic in narcotics was contained in the Act of February 18, 1931, as amended, (8 USC 156(a)) which provided:
>
> > "That any alien . . . who, after the enactment of this Act, shall be convicted for violation or *conspiracy to violate* any statute of the United States . . . taxing, prohibiting or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of . . . heroin . . . shall be taken into custody and deported in manner provided in Sections 19 and 20 of the Act of February 5, 1917. . . .
>
> "A comparison of the 1931 and the 1952 Acts concerning deportation on the ground of illicit traffic in narcotics reveals that the former specifically includes not only a conviction for a violation of a narcotic trafficking statute but also a conviction for conspiracy to violate such a statute, while the latter act is silent on this point of conspiracy and refers only to a conviction of a violation of any law or regulation *relating* to the illicit traffic in narcotic drugs. We conclude that this omission is fatal insofar as the present conviction is concerned, since in the instant case the alien has been convicted only of conspiracy in violation of 18 USCA 371. . . ."

It is also significant that elsewhere in the Immigration and Nationality Act, Congress has specifically provided

for the deportation of aliens who have been convicted of a violation or "conspiracy to violate" a specified law. Section 241(a)(5), 8 U.S.C. Section 1251(a)(5), 66 Stat. 204; Section 241(a)(17), 8 U.S.C. Section 1251(a)(17), 66 Stat. 207.

It is also significant that on July 19, 1956, long after the instant deportation proceedings were completed, Congress amended Section 241(a)(11) of the Immigration and Nationality Act so that the word "conspiracy" specifically appears therein. 70 Stat. 567, ch. 629. With reference to such amendment, Senate Document No. 145 (84th Congress, 2d Session) contains the following language (p. 4):

> "Section 241 (a) (11) is amended to include conspiracy to violate a narcotic law, and the illicit possession of narcotics, as *additional* grounds for deporting an alien." (Emphasis supplied.)

House Conference Report No. 2546 (84th Congress, 2d Session), reprinted in United States Code Congressional and Administrative News, Vol. 2 (1956), p. 3021, states:

> "Section 201 of the Senate amendment amended three provisions of the Immigration and Nationality Act. . . .
>
> "(2) It amended Section 241(a)(11) of that act by including conspiracy to violate any narcotic law, and the illicit possession of narcotics, as *additional* grounds for deporting any alien. . . .
>
> "The House bill contained no amendments to the Immigration and Nationality Act. The provisions in the conference agreement amending that act are in substance the same as the provisions contained in the Senate amendment." (Emphasis supplied.)

It thus conclusively appears that Congress was aware that a conviction of conspiracy was not a basis for deportation under Section 241(a)(11) of the Immigration and Nationality Act prior to its amendment, and that the

specific purpose and intent of Congress in amending Section 241(a)(11) was to make conspiracy an additional ground for deportation thereunder.

Moreover, the Attorney General has in effect confessed error in the instant case. In a letter dated May 4, 1945, to the Committee of the Judiciary of the United States Senate with respect to the then proposed Narcotic Control Act of 1956, the Deputy Attorney General pointed out that both Section 212(a)(23) of the Immigration and Nationality Act (8 U.S.C. Section 1182(a)(23), 66 Stat. 184), dealing with exclusion, and its counterpart, Section 241(a)(11), dealing with deportation, failed to provide for conspiracy as a ground for exclusion or deportation, respectively. Such letter contains the following language:

> ". . . However, section 212 (a) (2) makes no provision for the exclusion of aliens convicted of illicit possession of drugs, except in specified circumstances. Moreover, section 212 (a) (23) specifically covers only substantive violation of the narcotic laws and regulations; it is silent with respect to convictions of conspiracy to violate those laws and regulations. Section 201 (a) would amend section 212 (a) (23) to cure these deficiencies.
>
> "Section 201 (b) of the bill makes corresponding changes in section 241 (a) (11) of the 1952 act, providing for the deportation of alien narcotic addicts and aliens convicted of narcotic offenses. Like section 212 (a) (23), section 241 (a) (11) is silent with respect to convictions of conspiracy to violate the narcotic laws and regulations and contains similar limitation relative to convictions of illicit possession of narcotics. . . ." (Senate Report No. 1997, Calendar No. 2014, 84th Congress, 2d Session, p. 20.)

It follows, therefore, that a conviction of conspiracy was not a basis for deportation under Section 241(a)(11) of the Immigration and Nationality Act during the pendency of the instant deportation proceedings.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. COLLINS
Shoreham Building
Washington 5, D.C.

SAMUEL PAIGE
261 Broadway
New York 7, N.Y.
Attorneys for Petitioner

September, 1957.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,792

SEBASTIANO NANI, APPELLANT,

v.

HERBERT BROWNELL, JR., APPELLEE.

Appeal from the United States District Court for the District of Columbia

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Decided June 27, 1957

Mr. Samuel Paige, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Mr. William H. Collins* was on the brief, for appellant.

Mr. E. Riley Casey, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Lewis Carroll*, Assistant United States Attorney, were on the brief, for appellee.

Before PRETTYMAN, BAZELON and WASHINGTON, Circuit Judges.

PER CURIAM: This is a deportation case, in which the District Court granted the Government's motion for summary judgment. The facts and the issues involved are stated in Judge McGuire's memorandum of March 27, 1957, and need not be restated here.

On the principal point of law, we agree with the District Court that the appellant's conviction of conspiracy (under 18 U.S.C. § 371) to violate the Jones-Miller Act, 21 U.S.C. § 174, and the Harrison Narcotic Act, 26 U.S.C. § 2553(a), was a conviction of "a violation of any law or regulation relating to the illicit traffic in narcotic drugs" within the meaning of Section 241(a)(11) of the Immigration and Nationality Act, 66 STAT. 204, 206-207, 8 U.S.C. § 1251(a)(11), and that appellant was thus rendered deportable. We also agree with the District Court that the warrant of deportation adequately stated the nature of the crime of which appellant had been convicted.

Appellant further contends that he was not notified that his case had been referred to the Attorney General for review [1] after the Board of Immigration Appeals had ruled in his favor, and that he had no opportunity to file a brief before the Attorney General.[2] We think that under the circumstances of this case appellant cannot fairly allege lack of due process, or any prejudicial noncompliance with law. In his complaint for declaratory judgment in the District Court he raised the precise question of law which had been considered by the Attorney General, and which in actuality appears to have been the only subject of consideration by the latter, namely, the question of law above mentioned as to the interpretation of Section 241(a)(11) of the Immigration and Nationality Act. The District Court ruled on that question

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[1] Under 8 C.F.R. 6.1(h) (1953).

[2] Citing and relying upon Section 292 of the Immigration and Nationality Act, 66 STAT. 235, 8 U.S.C. § 1362 (1952). Appellant also complains that a copy of the Board's decision was not served upon him, as required by 8 C.F.R. 6.1(f) (1953). But it appears that he received a copy after the Attorney General had reviewed the Board's action.

at appellant's request, and appellant now urges this court to reverse the ruling. Under the circumstances, the ruling of the District Court appearing to us to be clearly correct, we think that it would be a frivolity to remand the case to the Attorney General for the receipt of briefs to give appellant the chance of securing from the Attorney General a new and different decision on a point of law which in the view of the District Court and this court would be erroneous. Perhaps if some question of discretion or of a change in a factual finding had been involved, appellant would have a stronger argument. *Cf. United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). The instant case involved solely a question of law, free of any element of administrative expertise or judgment.

Accordingly, the judgment of the District Court will be

Affirmed.

BAZELON, *Circuit Judge*, dissenting: Under applicable regulations [1] appellant was entitled to notice that the Board of Immigration appeals' decision in his favor had been referred to the Attorney General for review. The plain purpose of such notice is to afford appellant an opportunity to urge his position on brief to the Attorney General. Appellant was deprived of that opportunity since he was not given notice until after the Attorney General had reversed the Board's decision.

The integrity of each step in the regulatory scheme for administrative decision was emphasized in *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). There the Board of Immigration Appeals, to which the Attorney General had delegated his discretionary power to suspend deportation, under § 19(c) of the Immigration Act of 1917,

[1] 8 C.F.R. § 6.1(f).

had denied Accardi's application for suspension. Accardi appealed on the ground that inclusion of his name on the Attorney General's list of "unsavory characters" precluded fair consideration of his case by the Board. The Court held that the regulations by which the Attorney General delegated his discretionary authority to the Board forbid him to dictate the Board's decision, even though, as the dissenting justices pointed out, the Board's "every decision is subject to his unlimited review and revision." 347 U.S. at 269-70. "In short," said the Court, "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." *Id.* at 267.[2] The Court remanded the case to the District Court to determine whether there had, in fact, been a prejudgment; and if so, to order a new administrative hearing.

As long as the regulations in the instant case remain operative, the appellant must be afforded the opportunity to defend the Board's decision in his favor and the Attorney General must fairly consider any argument made. Since appellant was denied the opportunity to defend the Board's favorable decision before the Attorney General reversed it, the Attorney General's decision was not made in accordance with law and is therefore fatally defective.

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[2] See *Service* v. *Dulles*, 25 U.S. L. Week 4494 (June 17, 1957).

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

April Term 1957 C. A. 4515-56

Filed June 27, 1957 Joseph W. Stewart, Clerk

No. 13,792

Sebastiano Nani, Appellant,

v.

Herbert Brownell, Jr., Appellee

Appeal from the United States District Court
for the District of Columbia

Before: Prettyman, Bazelon and Washington, Circuit Judges.

JUDGMENT

This Cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration whereof, It is ordered and adjudged by this Court that the judgment.....of the said District Court appealed from in this cause be, and the same is hereby affirmed.

Dated: June 27 1957

Per curiam.

Separate dissenting opinion by Circuit Judge Bazelon.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 433

SEBASTIANO NANI, PETITIONER

v.

HERBERT BROWNELL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (Pet. App. 19–22). The memorandum opinion of the district court appears at pages 7–9 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1957 (Pet. App. 23). The petition for a writ of certiorari was filed on September 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether conspiracy to violate the narcotic laws was a deportable offense under Section 241 (a) (11)

of the Immigration and Nationality Act of 1952, prior to its 1956 amendment.

2. Whether failure to notify the petitioner of the ruling of the Board of Immigration Appeals prior to its transmission to the Attorney General, and the failure to give him the opportunity to present his views to the Attorney General, violated the regulations or denied petitioner due process.

STATUTES AND REGULATIONS INVOLVED

Section 241 (a) (11) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1251 (a) (11), provided:[1]

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, tranportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt deriva-

[1] Section 301 (b) of the Narcotic Control Act of 1956, 70 Stat. 567, 575, amended this provision *inter alia* by specifically referring to aliens convicted of conspiracy to violate the narcotic laws.

tive or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;

* * * * *

Section 292, 8 U. S. C. 1362, provides:

In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 C. F. R. 6.1 provides in pertinent part:

(a) There shall be in the office of the Attorney General a Board of Immigration Appeals. It shall be under the supervision and direction of the Attorney General and shall be responsible solely to him. * * *

(b) Appeals shall lie to the Board of Immigration Appeals from the following:

* * * * *

(2) Decisions of special inquiry officers in deportation cases, * * *

* * * * *

(d) (1) * * * the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case, * * *

(2) The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. * * *

* * * * *

(f) The decision of the Board shall be in writing and copies shall be transmitted by the Board to the Service and a copy served upon the alien or party affected as provided in §§ 292.11 and 292.12 of this chapter.

* * * * * *

(h) (1) The Board shall refer to the Attorney General for review of its decision all cases which:

(i) The Attorney General directs the Board to refer to him.

(ii) The chairman or a majority of the Board believes should be referred to the Attorney General for review.

(iii) The Commissioner or the Assistant Commissioner, Examinations Division, requests be referred to the Attorney General for review.

(2) In any case in which the Attorney General shall review the decision of the Board, his decision shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in paragraph (f) of this section.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the District of Columbia Circuit which, in affirming the judgment of the District Court for the District of Columbia, held that petitioner's conviction for conspiracy to violate the narcotic laws was a deportable offense within Section 241 (a) (11) of the Immigration and Nationality Act of 1952, 66 Stat. 206, *supra*, p. 2.

Petitioner, a native and citizen of Italy, entered the United States as a stowaway on October 2, 1924. On May 11, 1944, he was granted suspension of de-

portation pursuant to Section 19 (c) (2) of the Immigration Act of 1917 (R. 12, 19). On August 27, 1954, he was convicted in the United States District Court for the Northern District of California of conspiracy to sell heroin in violation of the Harrison Narcotic Act (26 U. S. C. 2553 and 2557) and to conceal and facilitate the concealment and transportation of heroin in violation of the Miller Export Import Act (21 U. S. C. 174) (R. 12–13, 15, 19).

On August 30, 1954, while in prison under this conviction, deportation proceedings were commenced against him by service of a warrant for arrest (R. 10–11). The warrant charged that he was deportable under Section 241 (a) (11) of the Immigration and Nationality Act, because (R. 10):

> * * * he has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein; conspiracy (18 U. S. C. 371) to violate Jones-Miller Act (21 U. S. C. 174) and Harrison Narcotic Act (26 U. S. C. 2553 (a)).

After a hearing, the Special Inquiry Officer ordered deportation (R. 11–13). The Board of Immigration Appeals, on April 14, 1955, rendered a decision reversing the finding of the Special Inquiry Officer on the ground "* * * that the crime of conspiracy does not constitute a conviction of a violation of a law relating to the illicit traffic in narcotic drugs" under

Section 241 (a) (11) of the 1952 Act (R. 14–17). Thereafter, the Commissioner of Immigration requested that the case be referred to the Attorney General for review (R. 17–19). The Board complied without notifying petitioner of such referral. On September 23, 1955, the Attorney General reversed the Board of Immigration Appeals on the ground that Section 241 (a) (11) of the 1952 Act was "[o]n its face * * * broad enough to cover a conviction for conspiracy to violate the narcotic laws" (R. 19–21). Thereafter copies of the Attorney General's and the Board's decisions were transmitted to petitioner (R. 4).

Petitioner then instituted this action for a declaratory judgment to review the deportation order (R. 1–5). The district court affirmed the administrative determination and granted the government's motion for summary judgment (R. 6–9). On appeal, the judgment was affirmed (Pet. App. 19–21). Judge Bazelon dissented on the ground that the regulations afforded petitioner the right to defend the Board's decision before the Attorney General (Pet. App. 21–22).

ARGUMENT

1. Petitioner contends (Pet. 14–17) that a conviction for conspiracy to violate the narcotic laws was not a deportable offense under Section 241 (a) (11) of the 1952 Act because such a conviction was not, in the terms of that section, a "violation of any law or regulation relating to the illicit traffic in narcotic drugs", but was a violation of the separate law, 18 U. S. C. 371, defining the separate crime of conspiracy.[2]

[2] Although the petitioner was convicted in 1954, the offense apparently occurred before the Act of November 2, 1951 (65

The decision below is correct in holding that, even before the 1956 amendment specifically covering conspiracy to commit narcotics offenses (see fn. 1, *supra*, p. 2) conspiracy was covered by Section 241 (a) (11). Unlike the Act of 1931,[3] Section 241 (a) (11) of the 1952 Act contained, for the first time, sweeping language providing for the deportation of aliens illicitly trafficking in narcotic drugs. The absence of any specific reference to conspiracy convictions (as had been made in the 1931 Act) was probably due to the fact that the new law, in using the words "any law or regulation relating to the illicit traffic in narcotic drugs", was thought to be broad enough to encompass both the substantive offender and the conspirator. The legislative history shows that Congress intended to broaden, not limit, the area of deportability with respect to aliens trafficking in narcotics. Thus, in its comprehensive study of the existing immigration sys-

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Stat. 767—the Boggs Act) which amended the Jones-Miller Act (21 U. S. C. 174) and the Harrison Narcotics Act (26 U. S. C. 2557 (b)) to make conspiracies to violate those acts specific crimes.

[3] 46 Stat. 1171, as amended, 54 Stat. 673, provided:

"That any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this Act) who, after the enactment of this Act, shall be convicted for violation of or conspiracy to violate any statute of the United States or of any State, Territory, possession, or of the District of Columbia taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in manner provided in sections 19 and 20 of the Act of February 5, 1917 * * *"

tem, the Senate Sub-Committee on the Judiciary suggested, in 1950 (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 410):

> * * * that the immigration laws contain specific provision for the deportation of aliens *who have been convicted of any law pertaining to narcotics.* Such aliens should be deportable, whether the conviction occurred prior to or after entry into the United States. *The deportable class will include those convicted under any law in this country pertaining to narcotics or under any such law of a foreign country.* [Emphasis added.]

The new provision was to apply to "[a]liens who, after entry, hereafter become narcotic drug addicts, or who at any time after entry becomes traffickers in narcotics". See S. Rep. No. 1137, 82d Cong., 2d Sess., p. 22. To the same effect, see H. Rep. No. 1365, 82d Cong., 2nd Sess., p. 60. It would be contrary to the clear Congressional intent to allow persons convicted of involvement in a scheme involving narcotics trade to escape deportation.

Petitioner's argument that conspiracy was not covered in 1952 relies heavily on the fact that the 1956 amendment specifically made conviction for conspiracy a ground for deportation, and on statements made in a letter from the Deputy Attorney General dated May 4, 1956, to the Senate Judiciary Committee supporting the amendment, and in Congressional reports, both suggesting that the amendment would provide an additional ground for deportation. (See S. Rep. No. 1997, 84th Cong., 2d Sess., pp. 16–21.) These statements, four years after the 1952 Act with relation to a

statute dealing mostly with matters other than immigration, do not change the effect of the 1952 language and legislative history. The Commissioner of Immigration has consistently taken the position that the 1956 amendments were merely desirable clarification. The legislative history of the Narcotic Control Act of 1956 reveals that pursuant to S. Res. 67, 84th Cong., 1st session, adopted March 18, 1955, the Senate Sub-Committee on the Judiciary commenced a study into narcotic problems (101 Cong. Rec. 3179–3180). During the hearings, the Commissioner of Immigration testified as follows:

> Mr. SWING. As long as we are on that, just one more point with the law. The word "conspiracy" to violate the act, you can be the head man and the head of a conspiracy that is going to bring this narcotic in here, but unless you personally have been indicted, convicted of these listed items, of importation or exportation, and so on, if you merely conspire or are convicted of conspiracy to import it or export it, it has been argued that under the law you are not deportable, because the word "conspiracy" has been left out.
>
> *This interpretation has not been accepted, but I am going to suggest the recommendation anyhow to make it specific and clarify it, that that is a deportable charge* [emphasis added]. [Hearings before the Subcommittee on Improvements in the Federal Criminal Code of the Committee on the Judiciary, 84th Cong., 1st Session, Part VI, p. 2144.]

Apparently adopting the Commissioner's view, the Senate Bill (S. 3760) as originally introduced on April 30, 1956, contained the conspiracy amendment

(102 Cong. Rec. 7246).[4] During subsequent hearings held on May 4, 1956, the letter from the Deputy Attorney General was received. At the same time, a letter from the Commissioner of Immigration was also received by the Senate Subcommittee which reiterated his previous views, see *supra*, p. 9, that the amendment was beneficial because it " * * * strengthens and clarifies provisions of the Immigration and Nationality Act relating to the exclusion and deportation of violators of narcotic drug laws, * * * ". See, Hearings Before the Subcommittee on Improvements in the Federal Criminal Code of Committee of the Judiciary, 84th Cong., 2d Sess.; pp. 7–11, 13–14.

In any event, there can be no doubt that under the 1956 amendment, conspiracy convictions are deportable offenses under Section 241 (a) (11). Hence, there is now no question of general importance relating to the construction of this statute requiring the attention of this Court.[5]

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[4] The original House Bill (H. R. 11619), introduced on June 6, 1956, contained no such amendment (102 Cong. Rec. 9728). The Senate amendments were thereafter adopted by the Conference Committee. H. Conf. Rep. No. 2546, 84th Cong., 2d Sess., p. 17.

[5] The petitioner's argument that the Attorney General found him deportable for violation of a law relating to illicit traffic in narcotics while the warrant instituting the deportation proceeding alleged violations of the law controlling the "taxing, manufacture, production, compounding, transportation, sale" etc. of drugs (Pet. 12–14) is difficult to understand. If, by this argument, the petitioner means that the warrant charged conviction for violation of the substantive offense, rather than for conspiracy, it rests on a partial reading of the warrant which specifically referred to conspiracy to violate the Jones-Miller Act and the Harrison Narcotic Act. See p. 5, *supra*. If, by his argument, the petitioner means that the Attorney General did not find a conviction for an offense relating to the "taxing, man-

2. The petitioner's argument (Pet. 9–12), that the failure to notify him that the case was being referred to the Attorney General for review and to give him an opportunity for further hearing violated the regulations and was a denial of due process, misconceives the nature of the process involved.

Under Section 103 of the 1952 Immigration and Nationality Act (66 Stat. 173–174), the Attorney General is charged with final control over the administration and enforcement of the Act. Pursuant to his authority, he has adopted regulations establishing the Board of Immigration Appeals to act for him in considering appeals (8 C. F. R. 6.1 (b) (2), (d) (2)). On such appeals, aliens are accorded the right of oral argument, representation by counsel, submission of briefs—in short, the complete right to be heard (8 C. F. R. 6.1 (e), 6.11). Petitioner received, and availed himself of, all of these safeguards. Thus, the requirements of Section 292 of the Act, providing that an alien have the privilege of representation by counsel "* * * in any appeal proceedings before the Attorney General * * *" from decisions of special inquiry officers, were manifestly satisfied by the rights accorded the petitioner before the Board.[8]

The additional consideration given the petitioner's case by the Attorney General was not in the course of an

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ufacture" etc of drugs, this too is in error since the conclusion of the Attorney General certainly covered conspiracy to violate 21 U. S. C. 174 as well as 26 U. S. C. 2553 (a).

[8] Congress was, of course, fully apprised of the Attorney General's practice and knew that appeals were passed upon by the Board of Immigration Appeals except in the special circumstances when they were referred to him. S. Rep. No. 1515, 81st Cong., 2d Sess. p. 347.

additional appeal, but was part of the appeal on which he had already been heard. It occurred pursuant to the regulations (8 C. F. R. 6.1 (h) (1) (2)) because the case was one of those in which it was deemed appropriate for the Attorney General, as a matter of intradepartmental administration, to reexamine the conclusions of the board for which he was responsible. Since in that very proceeding, the petitioner had been fully heard there was no necessity of inviting additional briefs and argument.'

Nor did the failure to transmit a copy of the Board's opinion to the petitioner prior to the referral of the case to the Attorney General violate the regulations. This was in accord with the regular practice of the Board in those cases where its decision is reexamined by the Attorney General. The regulation, 8 C. F. R. 6.1 (f), *supra*, p. 4, requires the Board to serve its decision upon the alien affected thereby. But in cases where the Board's decisions are referred to the Attorney General, they have no finality (8 C. F. R. 6.1 (d) (2), *supra*, p. 3) and are therefore not at that time decisions affecting aliens within the meaning and intent of the regulations. When a final decision had been reached by the Attorney General affecting the petitioner's rights, a copy of it, together with the Board's opinion, was transmitted to him.

The very question here involved was raised in *Ex parte Bridges*, 49 F. Supp. 292 (N. D. Cal.), affirmed,

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'The view that an alien does have a right under the regulations to submit written briefs and memoranda to the Attorney General was taken in *Bannout* v. *Brownell*, 129 F. Supp. 488 (D. D. C.), which we believe was wrongly decided.

sub nom. Bridges v. *Wixon*, 144 F. 2d 927 (C. A. 9), reversed on other grounds, 326 U. S. 135. There the district court stated (49 F. Supp. at 304):

> Petitioner filed briefs with the Presiding Inspector and with the Board of Immigration Appeals. His side of the case, on the facts, was well presented in the opinion of the Board of Immigration Appeals. These documents were all a part of the record submitted to the Attorney General. Petitioner makes no claim that had he been given the opportunity of arguing his case further before the Attorney General he would have raised any point which had not been fully covered already in his briefs on file or in the Board Memorandum. The failure to afford petitioner the opportunity of re-arguing his side of the case before the Attorney General did not deny him due process.

The basic fault in the petitioner's position is the failure to recognize the Board of Immigration Appeals as merely an *alter ego* of the Attorney General. This Court described it in *Accardi* v. *Shaughnessy*, 347 U. S. 260, 266–267, as follows:

> The Board is appointed by the Attorney General, serves at his pleasure, and operates under regulations providing that: "In considering and determining . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. * * *" * * * [It] is a nonstatutory board composed of subordinates within a department * * *.

When the petitioner appeared before the Board he was in effect appearing before the Attorney General. Neither the regulations nor the Fifth Amendment gave him the right to make additional appearances merely because the Attorney General chose to give the case additional consideration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

OCTOBER 1957.

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